STATE OF MICHIGAN

COURT OF APPEALS

JAMES PROKES, as Subrogee of WATER-TITE COMPANY,

Plaintiff-Appellant,

v

AUTO-OWNERS INSURANCE COMPANY,

Defendant-Appellee,

and

GREAT AMERICAN ALLIANCE INSURANCE COMPANY,

Defendant.

UNPUBLISHED
September 25, 2008

No. 278321
Oakland Circuit Court
LC No. 07-008583-AV

Before: Borrello, P.J., and Murray and Fort Hood, JJ.

PER CURIAM.

Plaintiff appeals by leave granted the circuit court's May 11, 2007 order affirming the district court's January 9, 2007 order granting defendants' motion for summary disposition. Plaintiff argues that the district court and circuit court both erred in granting summary disposition in Auto-Owners Insurance Company's (AOIC) favor, finding that AOIC did not have to defend or indemnify Water-Tite Company (WTC) because, under the terms of AOIC's policy, the damage in the lawsuit against WTC was not caused by an "occurrence." We affirm, as under the policy the complained of property damage was not caused by an "occurrence," and thus AOIC was not required to indemnify or defend WTC (or plaintiff).

The underlying factual history relevant to the disposition of this appeal is undisputed. John Casey and his wife, Mary Lou Butcher, discovered a water intrusion in Casey's third level office in their newly constructed home in January 2000. The leakage became more extensive in 2002, eventually leaking down to the second level great room, staining the walls and causing mold. After hiring a troubleshooting team (Principal Construction), Casey and Butcher discovered that their water problems were a result of missing "flashing" and shingles from the roof, as well as an improperly constructed drainage system on their "roof walkout" (above Casey's office). Casey and Butcher's insurer, Great Northern Insurance Company (GNIC), paid to have the problems fixed.

GNIC, as subrogee of Casey and Butcher, subsequently filed suit against Jonna Construction Company (JCC), the general contractor who built the home in 1997-1998, seeking $626,001.39 for alleged defects in the home that caused "extensive water damage and resultant mold due to roof leakage and leaks of the third level walkout." On March 22, JCC filed a third-party complaint naming as third party defendants all of the subcontractors who worked on the house, including WTC, who according to JCC, only did the waterproofing of the basement (first level), which indisputably was not damaged.

In turn, WTC submitted claims to AOIC, who insured it under successive commercial liability policies that provided coverage from July 1, 1999 to July 1, 2002, and Great American Alliance Insurance Company (GAAIC), who had issued a commercial liability policy covering the period of October 1, 1998 to July 1, 1999. AOIC initially undertook to defend WTC, but eventually withdrew its coverage in a February 25, 2005 letter stating, "any occurrence as defined under the insurance policy contract did not occur during the policy period."

Plaintiff, the former owner of WTC, subsequently settled the third-party complaint for $6,500. Shortly thereafter, plaintiff filed the suit before us, seeking to recover the settlement amount, as well as the $5,808.50 that he paid in attorney fees. Both insurance companies and plaintiff subsequently moved for summary disposition. At the December 20, 2006, hearing on the insurance companies' and plaintiff's respective motions for summary disposition, the district court initially noted (and all parties agreed) that the original lawsuit really had nothing to do with WTC, and it "just got pulled in" because JCC added all subcontractors to the suit in its very general third party complaint. The district court granted GAAIC's motion for summary disposition based on its finding that the damage occurred in January 2000, which was outside of GAAIC's period of coverage. The district court granted AOIC's motion for summary disposition based on its finding that "[p]laintiff has not put forth any evidence that shows the factual situation at hand is covered by the policy." An order was entered to this effect on January 9, 2007. In a written opinion dated May 11, 2007, the circuit court affirmed the district court's January 9, 2007, order, likewise finding that "defective workmanship does not constitute an 'occurrence' under the terms of the policy," and given that the claims brought against plaintiff were for defective workmanship, AOIC was not obligated to defend or indemnify plaintiff. We subsequently granted plaintiff's application for leave to appeal.

I. Standard of Review

We review de novo a trial court's decision to grant or deny a motion for summary disposition, *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003), viewing the pleadings, affidavits, depositions, admissions and other documentary evidence submitted in a light most favorable to the nonmoving party, *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). "Summary disposition under MCR 2.116(C)(10) is appropriately granted if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *Rose v Nat'l Auction Group*, 466 Mich 453, 461; 646 NW2d 455 (2002). Furthermore, the construction and interpretation of an insurance contract is a question of law that we likewise review de novo. *Henderson v State Farm Fire & Casualty Co*, 460 Mich 348, 353; 596 NW2d 190 (1999).

II. Analysis

In reviewing an insurance policy dispute we must look to the language of the insurance policy and interpret the terms in accordance with Michigan's well-established principles of contract construction. *Arco Industries Corp v American Motorists Ins Co,* 448 Mich 395, 402; 531 NW2d 168 (1995), abrogated on other grounds by *Frankenmuth Mut Ins Co v Masters*, 460 Mich 105; 595 NW2d 832 (1999). We must enforce an insurance contract in accordance with its terms, not creating ambiguities where the terms of the contract are clear and precise. *Upjohn Co v New Hampshire Ins Co,* 438 Mich 197; 207, 476 NW2d 392 (1991). While we construe the contract in favor of the insured if an ambiguity is found, *Auto Club Ins Ass'n v DeLaGarza,* 433 Mich 208, 214; 444 NW2d 803 (1989), this does not mean that the plain meaning of a word or phrase should be perverted, or that a word or phrase, the meaning of which is specific and well recognized, should be given some alien construction merely for the purpose of benefiting an insured, *Upjohn Co, supra* at 208, n 8. The fact that a policy does not define a relevant term does not render the policy ambiguous. *Auto Club Group Ins Co v Marzonie,* 447 Mich 624, 631; 527 NW2d 760 (1994), abrogated on other grounds by *Frankenmuth Mut Ins Co, supra*. Rather, reviewing courts must interpret the terms of the contract in accordance with their commonly used meanings. *Group Ins Co of Michigan v Czopek,* 440 Mich 590, 596; 489 NW2d 444 (1992).

Under the terms of AOIC's policy, it is required to "pay those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies[,]" as well as "defend any 'suit' seeking those damages." Assuming[1] that a legal obligation to pay existed, pursuant to the terms of AOIC's policy, it was required to "defend" WTC, and is now required to indemnify plaintiff if it is found that "this insurance applies."

AOIC's policy provides that "[t]his insurance applies to 'bodily injury' and 'property damage' only if" the "property damage is caused by an 'occurrence' that takes place in the 'coverage territory' and . . . occurs during the policy period." The parties do not dispute the lower court's findings that the property damage took place in the "coverage territory" and "during the policy period." Therefore, AOIC's policy is applicable if the complained of property damage was caused by an "occurrence."

The policy defines an "occurrence" as "an accident." The term "accident" is not defined by the AOIC policy. However, using the common meaning of the term, our Supreme Court has repeatedly held that "an accident is an undesigned contingency, a casualty, a happening by chance, something out of the usual course of things, unusual, fortuitous, not anticipated, and not

---

[1] Generally, a legal obligation "requires either a judicial determination of liability or a settlement between *the insurer, insured and the claimant*." *Coil Anodizers, Inc v Wolverine Ins Co,* 120 Mich App 118, 122; 327 NW2d 416 (1982) (emphasis added). Here, it was never judicially determined that WTC was required to pay damages, nor did AOIC agree to the terms of a settlement. However, in this instance, AOIC was considered "legally obligated" because it refused to defend an action brought against its insured, and thus waived the requirement that it participate in or approve any settlement in order for there to be coverage. *Id*. at 122, 124.

naturally to be expected." *Frankenmuth Mut Ins Co, supra* at 114. When determining whether property damage was caused by an accident, we must consider (from the standpoint of the insured), *the insured's injury-causing act or event* and its relation to the resulting property damage. *Id*. at 114-115.

Here, the circuit court affirmed the district court's order based on its finding that the district court did not err when it found that defective workmanship cannot constitute an accident/occurrence, and given that "the water damage in question was caused in fact by faulty workmanship," there was not "an 'occurrence' under the terms of the policy." Plaintiff properly notes that both of the lower courts' general statements that "faulty workmanship" cannot constitute an accident/occurrence are flawed. In *Radenbaugh v Farm Bureau Insurance Co of Michigan*, 240 Mich App 134, 147; 610 NW2d 272 (2000), where a policy with language similar to the policy in the case at bar was being disputed, the Court concluded that "faulty workmanship" that results in property damage to the property of *others* can be an accident/occurrence:

> When *an insured's defective workmanship* results in property damage to the property of *others*, an 'accident' exists within the meaning of the standard comprehensive liability policy. . . . However, when the damage arising out of the *insured's defective workmanship* is confined to the *insured's own work product*, the insured is the injured party, and the damage cannot be viewed as accidental within the meaning of the standard liability policy. [(Emphasis added.)]

Although the alleged damage here was not to the insured's work product,[2] since water cannot flow up, the alleged damage was also not a result of the "insured's defective workmanship." Thus, viewing the alleged damages from the standpoint of the insured, under the terms of AOIC's policy the complained of property damage was not caused by an "occurrence." *Masters, supra* at 114-115; *Radenbaugh, supra* at 147. According to the plain language of AOIC's policy, its policy was therefore not applicable, and it was not required to indemnify or defend WTC (or plaintiff). *Upjohn Co, supra* at 207.[3]

---

[2] It is undisputed that WTC only waterproofed the basement (first level), and that the alleged damage was to the second and third levels of the constructed home.

[3] Despite AOIC's unambiguous policy language that it is only required to defend a suit seeking damages to which its insurance is applicable, plaintiff contends that because an insurer's duty to defend is broader than its duty to indemnify, *Shefman v Auto-Owners Ins Co*, 262 Mich App 631, 637; 687 NW2d 300 (2004), AOIC should have had to defend WTC because, at the very least, the allegations of the underlying suit *arguably* fell within the coverage of the policy, *Radenbaugh, supra* at 137. Even if we were to look past the unambiguous language of AOIC's policy and conclude that AOIC had a duty to defend allegations that even "arguably" fell within its policy, we would nonetheless conclude that AOIC was not required to defend WTC. The complained of property damage was not a result of any of WTC's actions, the allegations of the underlying suit could not even "arguably" fall within AOIC's policy.

Affirmed.

/s/ Stephen L. Borrello
/s/ Christopher M. Murray
/s/ Karen M. Fort Hood